

# Making Sentencing Sensible

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*This Term, Cunningham v. California offers the Supreme Court a rare opportunity to bring order to its confusing, incoherent, formalistic body of sentencing law. Sentencing law must accommodate many structural and individual constitutional interests: federalism, the separation of powers, democratic experimentation, individualization, consistency, efficiency, and procedural fairness and notice. The Court, however, has lurched from under- to over-regulation without carefully weighing competing principles and tradeoffs. A nuanced, modern sentencing jurisprudence would emphasize that a trial is a backward-looking, offense-oriented event well suited for a lay jury. Sentencing, in contrast, includes forward-looking, offender-oriented assessments and calls upon an expert, repeat-player judge to exercise reasoned judgment. Juries should find offense facts, but judges may find offender facts and also exercise judgment at sentencing. Within these bounds, the Court should preserve states' flexibility to experiment with different roles for juries, judges, legislatures, sentencing commissions, probation and parole officers, and trial and appellate courts. In particular, while certain types of mandatory guidelines are constitutionally problematic, voluntary or even presumptive guidelines should be permissible so long as judges do not usurp the traditional role of juries and appellate courts meaningfully review sentencing judges' reasons for imposing sentences within and outside ranges. This modest approach, which preserves room for experimentation, fits best with legal-process values and is least likely to provoke evasion.*

The Supreme Court stands poised at a crossroads. After *Apprendi*, *Blakely*, and the dual opinions in *Booker*,<sup>1</sup> the Court's sentencing jurisprudence is at best confusing, at worst conceptually incoherent. But the new Term begins with a case concerning the constitutionality of California's structured sentencing system, *Cunningham v. California*, which offers the Justices a rare opportunity to bring order out of chaos.

At the heart of the post-*Apprendi* sentencing struggles is the form of the Court's work. In *Apprendi* and *Blakely*, the Supreme Court imposed a formalistic, bright-line rule on a functional, dynamic area of law. The legal landscape after *Blakely* and

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<sup>1</sup> United States v. Booker, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

*Booker* is messy because lower courts and legislatures have tried to make the Supreme Court's crude doctrines more practical and nuanced. Tellingly, *Cunningham* came to the Court after the highest state courts of California, New Mexico, and Tennessee resisted following *Blakely*'s seemingly clear mandate. These courts resisted *not* because the state Justices were thumbing their noses at the decision, but because they were more attentive to local realities and needs.

The Supreme Court's new opportunity to improve modern sentencing law arises in part because its personnel have changed. Two Justices who consistently resisted the Court's modern approach to the Sixth Amendment are no longer on the Court. The new Chief Justice has shown an ability to bring unanimity and cohesion to an oft-fractured Court. In addition, the new Associate Justice brings a former prosecutor's perspective, which the Court had previously lacked. Perhaps more importantly, the timing is right for the Justices to improve modern sentencing law. The issues raised by *Apprendi*, *Blakely*, and *Booker* have percolated long enough for the Court to articulate core principles that should guide future sentencing developments. *Cunningham* is a fitting vehicle for taking stock of the Court's recent work and embarking on a sounder path.

What core principles should guide the Supreme Court's development of its sentencing jurisprudence? Obviously, one cannot derive a complete set of sentencing rules simply by squinting hard at the wording of the Sixth Amendment. Moreover, post-*Apprendi* developments reveal that formalistic constitutional doctrines alone cannot effectively promote jury involvement or prompt sound legislative responses. The Court must also consider that its jurisprudence influences not only structured sentencing systems, but also the unstructured sentencing systems still used by a majority of states.

We approach the task of identifying core sentencing principles from different perspectives, much as the Justices will. One of us supports the *Apprendi* line of cases; the other one has been a vocal critic. One is a former prosecutor; the other, a former defense attorney. Yet, taking the *Apprendi* line of cases as a given, we see a series of principles that can and should ground the future of sentencing jurisprudence and make sentencing more sensible.

As a theoretical matter, principles need to differentiate juries' and judges' roles. Juries have a historic and structurally important role in those cases that involve disputes over offense conduct. Juries should make findings about the offense conduct that constitutes the criminal behavior forbidden by legislatures. Judges, in turn, must be able to assess offender characteristics and to make reasoned judgments that are essential to just and effective sentencing decisions. Rules need to delimit the decision-making spheres of juries and judges.

Sentencing decisions implicate many interests and actors often working at cross-purposes. Constitutional doctrines must be sensitive to these realities. The Court's formalistic doctrines, however, risk strangling democratic innovation and can disserve procedural justice and defendants' interests. States, which sentence most defendants, serve as laboratories of democratic experimentation and need room to try novel

sentencing arrangements. State legislatures, sentencing commissions, judges, and prosecutors are sensitive to local conditions and resource constraints. Legal process considerations direct courts to be attentive to federalism, separation of powers, and the concerns and voices of various criminal justice actors.

We suspect that the Court will declare unconstitutional aspects of California's Determinate Sentencing Law (DSL) after hearing *Cunningham* this fall. We suggest, however, that the decision's reasoning and dicta be attentive to both principles and practice. Part I of this Article begins by discussing principles that should inform the development of sentencing law. Constitutional sentencing rules should respect federalism and democratic experimentation, while also recognizing the virtues of input from various branches and actors. This Part explores some missteps in the Court's sentencing jurisprudence, which further highlight why the Court should avoid writing *Cunningham* too broadly. In the past, the Court has embraced sweeping rules that rest on opaque conceptual foundations. Modest legal-process themes, however, could prove more fruitful and bring greater clarity and consistency to the Court's sentencing jurisprudence. State experience suggests the need to learn from local experimentation and democratic processes. Otherwise, political and resource pressures may contort criminal justice systems as various actors respond to a crude jurisprudence.

Part II moves on to consider how courts should structure and allocate sentencing power in light of the Sixth Amendment's commands and due process principles. We propose a principled division of labor: Juries should resolve disputes over offense conduct at trial, while judges should make broader value judgments and offender assessments at sentencing. The theme that justifies judicial sentencing as a phase distinct from jury trial is that it embodies reasoned practical judgment, reviewable on appeal. States may entrust discretion to judges, so long as they neither steal traditional offense elements from juries nor undermine our commitment to fair adversarial processes.

Part III then discusses how to structure sensible constitutional limits on judicial sentencing discretion. Here, we consider a variety of state systems. Mandatory sentencing caps and enhancements, which use mathematical precision to thwart reasoned judgment, fall afoul of *Apprendi* and *Blakely*. At the other end of the spectrum, voluntary guidelines that seek to provide sentencing judges with useful information and mental anchors are clearly permissible. In between, default or presumptive starting points should also be permissible, so long as judges choose individual sentences and are reviewed for their reasoning. This approach suggests problems with safe-harbor approaches that encourage judges to give no or minimal reasons for their sentences. It also flags difficulties with appellate review that would in effect turn rules of thumb back into mandatory guidelines. True guidelines, however, with presumptive starting points and careful review of deviations, could encourage the right kinds of reasoning and conformity in the right cases. Legislatures could voice their input on issues, but judges would still ensure that those global policy

judgments fit and made sense in individual cases. Reasoned opinions, backed up by meaningful and nuanced appellate review, would be the backbone of the system.

## I. NUANCED PRINCIPLES AND CRUDE DOCTRINES

Over the last half-century, sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of rules. One can identify both virtues and vices in the older, discretionary sentencing systems and in the newer, rule-bound ones. But the pendulum swings in modern sentencing history direct us toward a set of principles that can help frame the development of just and effective sentencing law. Section A explores the structural, policy, practical, and rights-based principles that should inform future sentencing reform. Section B traces and critiques the Supreme Court's response to, and partial responsibility for, the lurch from under- to over-regulation of sentencing.

### A. *Dynamic Sentencing Principles*

Sentencing is about resolving individual cases fairly and effectively and about structuring criminal justice power. Though jurists and philosophers have long debated theoretical justifications for punishment, structural and procedural principles for sentencing have rarely received sustained attention. Subsection 1 considers the broad structural concepts that should inform modern sentencing regimes. Federalism and separation of powers divide and check power. They leave room for democratic experimentation and draw on the expertise of myriad actors in a decentralized system. Juries play an important role in this scheme, checking prosecutors and judges and bringing the community's conscience and common sense to bear. Subsection 2 examines policy and practical considerations. Sentencing rules must balance individualized justice against systemic consistency and balance efficiency against procedural fairness. Subsection 3 reflects on individual defendants' rights. Concerns about personal liberty, power imbalances, over-punishment, and due process should all influence constitutional and sub-constitutional sentencing rules.

#### 1. Structural Principles

The United States' federal system profoundly shapes American criminal justice. As the Supreme Court recognized in *Lopez* and *Morrison*, criminal law is traditionally the province of the states.<sup>2</sup> Each state defines crimes and applies punishments in its own particular way. Thus, some states choose to apply the death penalty for many crimes, others for only a few, while others do not use capital punishment at all. Some states experiment with sentencing commissions and structured sentencing guidelines, while others retain traditional unstructured (sometimes called indeterminate)

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<sup>2</sup> *United States v. Morrison*, 529 U.S. 598, 610–11, 617–18 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 560–61, 566–67 (1995)).

sentencing. Even state sentencing guidelines vary widely on structural issues such as whether they are binding, whether they abolish or regulate parole, and whether they apply to misdemeanors, probation, and intermediate sanctions.<sup>3</sup> This federal variation is not only necessary but desirable. It protects state citizens against federal government overreaching and reflects local values and preferences.<sup>4</sup>

Another virtue of federalism is that it lets states act as laboratories of experimentation and reform. States have historically regulated crime and punishment and so have developed expertise in this area. The federal government should not lightly foreclose this experimentation.<sup>5</sup> So long as states respect basic constitutional constraints, they should retain great latitude to try different approaches to criminal sentencing. Democratic oversight lets each state respond to its own citizens' interests and crime concerns, to diverse criminal justice structures, and to prison capacity and cost constraints.<sup>6</sup> States can learn from one another's experiences and build on their most successful experiments.

Just as federalism divides power vertically between the federal and state governments, the separation of powers divides criminal justice power horizontally. Legislatures and sentencing commissions define crimes and punishments *ex ante*, while prosecutors seek to apply these laws to individual cases *ex post*. Juries check prosecutors' charging decisions by deciding guilt, and trial judges do so by selecting appropriate sentences. Appellate judges review all of these actors' decisions. In other words, the state cannot impose punishment without the concurrence of numerous actors, and the system necessarily accommodates the wisdom of each. Different criminal laws and sentencing structures greatly influence the distribution of power among different actors,<sup>7</sup> but some decentralization is inevitable. This decentralization usefully incorporates the expertise and common sense of multiple actors.

Juries, in particular, are meant to play a large and distinctive role in criminal justice. The right to a criminal jury trial is the only right that appears not only in the

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<sup>3</sup> Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1194–1206 (2005) [hereinafter Frase, *State Sentencing Guidelines*].

<sup>4</sup> *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973)); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>5</sup> *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); see also *Blakely*, 542 U.S. at 326–28 (Kennedy, J., dissenting) (expressing concerns that the broad constitutional limits on sentencing structures “implicates not just the collective wisdom of legislators on the other side of the continuing dialogue over fair sentencing, but also the interest of the States to serve as laboratories for innovation and experiment”).

<sup>6</sup> See Marc L. Miller, *Cells vs. Cops vs. Classrooms*, in *THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE* 127 (Lawrence M. Friedman & George Fisher eds., 1997) (highlighting that localities tend to make more informed and balanced criminal justice decisions).

<sup>7</sup> See Kevin Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POL’Y 389 (1998). See generally NORA V. DEMLEITNER ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 65–116 (2004) (reviewing the ways in which different sentencing decision-makers have different powers within distinct sentencing structures).

body of the original Constitution, but also in the Bill of Rights.<sup>8</sup> The Framers took such pains because, in the criminal arena, government power is at its zenith and poses the greatest threat to personal liberty. The Framers particularly worried that legislatures, prosecutors, and judges might conspire to convict and harshly punish politically unpopular defendants. They trusted juries to use their common sense and conscience to test prosecutors' allegations.<sup>9</sup> Thus, they gave juries an important checking role, in essence a veto over unfounded prosecutions.<sup>10</sup> As Justice Scalia emphasized in his opinion for the Court in *Blakely*, the right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."<sup>11</sup>

Unfortunately, today jury involvement in the criminal justice system is the exception rather than the rule. Roughly 95% of adjudicated cases result in guilty pleas, which subvert the jury's opportunity to check prosecutors and judges.<sup>12</sup> Though many observers analyze the legal system as if jury trials are still common, in fact bargained justice marginalizes the jury's place in our modern criminal justice system.

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<sup>8</sup> U.S. CONST. art. III, § 2, cl. 3 (guaranteeing "The Trial of all Crimes" by jury); U.S. CONST. amend. VI (guaranteeing jury trial "In all criminal prosecutions"); see also *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting) (calling the jury-trial right "the spinal column of American democracy" because it appears in the body of the Constitution and also the Bill of Rights).

<sup>9</sup> See *United States v. Khan*, 325 F. Supp. 2d 218, 230 (E.D.N.Y. 2004) (Weinstein, J.) (discussing the Framers' vision of the importance of juries in criminal justice and explaining that "the jury was, and remains, the direct voice of the sovereign, in a collaborative effort with the judge. It expresses the view of a sometimes compassionate free people faced with an individual miscreant in all of his or her tainted humanity, as opposed to the abstract cruelties of a more theoretical and doctrinaire distant representative government."); see also Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 959-63, 992-99 (2003) (discussing juries' de facto control of sentencing at English common law and reasons why juries should check judges and select appropriate retribution).

<sup>10</sup> See Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012-17 (2006); see also *United States v. Kandirakis*, 441 F. Supp. 2d 282, 312-16 (D. Mass. 2006) (Young, J.) ("Quite apart from nullification, juries serve an important structural function by bolstering the credibility and popular appeal of the judiciary. Though creating an independent judiciary may have assuaged the need for jury nullification of executive power run amok, only the most closed-minded imperialists of executive and congressional power would denigrate the necessity of the judiciary to check those branches in appropriate cases.").

<sup>11</sup> *Blakely*, 542 U.S. at 305-06; see also Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 339-53 (2003) (developing democratic defense of jury sentencing and comparing juries favorably with legislatures, agencies, and judges).

<sup>12</sup> Barkow, *supra* note 10, at 1047 n.310; U.S. BUREAU OF JUSTICE STATISTICS, 2003 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 426 tbl.5.24 (reporting that 71,683 of 75,573 adjudicated federal felony defendants, 94.8%, pleaded guilty), 450 tbl.5.46 (reporting that 95% of state felony convictions were obtained by guilty plea); see also *United States v. Green*, 346 F. Supp. 2d 259, 265-79, 281-82, 310-11, 316-17 (D. Mass. 2004) (explaining how the plea process undermines the jury-trial right), *vacated in part by United States v. Yeje-Cabrera*, 430 F.3d 1 (1st Cir. 2005), and *vacated and remanded by United States v. Pacheco*, 434 F.3d 106 (1st Cir. 2006).

## 2. Policy and Practical Considerations

Sentencing is where the criminal justice system cashes out. Thus, sentencing law implicates many policy and practice issues along with the structural principles set forth above. A chief overt policy concern in modern sentencing systems has been balancing individualized justice and systemic consistency. A chief covert practical concern has been balancing efficiency against procedural fairness.

Debates over the pros and cons of judicial sentencing discretion have now raged for decades. These debates obscure the consensus that sentencing must balance individualized justice and systemic consistency.<sup>13</sup> The true challenge is how best to develop a sentencing structure that can reasonably achieve both goals at once. On the one hand, sentencing law should minimize “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”<sup>14</sup> On the other hand, it should be flexible enough “to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.”<sup>15</sup>

Balancing individualization and consistency is particularly challenging because multiple actors exercise overlapping discretion that affects sentences. Different victims report crimes differently; different police officers investigate crimes differently; different prosecutors pursue and resolve charges differently; and different defendants and defense attorneys respond to plea options differently.<sup>16</sup> In other words, many discretionary choices affect sentencing well before the formal sentencing process begins. A measure of case-specific individualization, which is impossible to control and often hard even to observe, is inherent in any criminal justice system.<sup>17</sup>

Because discretion plays such a large role, formal legal doctrines can have only so much influence on the balance between individualization and consistency. For this reason, sentencing structures and rules should focus on making the exercise of discretion reasoned, transparent, and subject to review. Discretion is not pernicious if exercised well, but illegitimate factors are more likely to influence decisions when

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<sup>13</sup> No one seriously argues that judges at sentencing ought to have unlimited authority to select any sentence from probation to death for any crime. Likewise, no one seriously argues that judges at sentencing ought to have no opportunity whatsoever to consider the particular nature of a crime and the particular characteristics of an offender.

<sup>14</sup> 28 U.S.C. § 991(b)(1)(B) (2006).

<sup>15</sup> *Id.*

<sup>16</sup> See generally ALFRED BLUMSTEIN ET AL., 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 41–47 (1983) (emphasizing that the operation of a criminal justice system involves a complex “network of multiple, overlapping, and interconnecting discretions and conflicting goals . . . influenced by powerful forces of tradition, institutional convenience, scarcity of resources, and self-interest”).

<sup>17</sup> See generally U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) (suggesting that even elaborate mechanisms and procedures designed to control disparity arising at presentencing stages are rarely effective at improving the uniformity of sentencing outcomes).

discretion is hidden and impervious to external scrutiny. Sentencing mechanisms should reveal and channel the inevitable exercise of discretion by various decision-makers.

A second, less visible issue in criminal justice design is the challenge of balancing efficiency and fairness in case processing. Heavy caseloads, finite resources, and competing priorities limit how much process the system can allocate to any individual case. These pressures push many cases into lightly regulated plea bargaining, for example.<sup>18</sup> Resource constraints also affect particular criminal investigations, adjudications, and punishments in myriad ways.

Efficiency issues often seem taboo in criminal justice debates, perhaps because the human stakes are so high for serious crimes and significant punishments. Yet efficiency concerns regularly influence sentences. In plea bargaining, prosecutors offer sentencing discounts in exchange for waivers of trial and other procedural rights.

Resource constraints have always influenced various sentencing options, from imprisonment to alternative sentencing schemes to rehabilitative programs. And, historically, courts have recognized few procedural rights at sentencing, perhaps because routine use of elaborate procedures would slow criminal justice to a crawl.<sup>19</sup>

Because efficiency issues will always loom large, formal legal rules must be attentive to the costs they may impose. Actors in the criminal justice system can and will circumvent procedures that are expensive and do not achieve other important goals. The most effective sentencing structures and rules will help the justice system get the most bang for its buck.

### 3. Individual Defendants' Rights Principles

Of course, the most interested participant at sentencing is the defendant. A principled sentencing system must safeguard defendants' rights. Our nation's commitment to protecting individual liberty and limiting government power should prompt concerns about over-punishing the guilty, just as we worry about wrongfully punishing the innocent. Sentencing structures and rules should be attentive to

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<sup>18</sup> See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 815–17 (2006); see also Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (2005) (discussing frequency and problems with federal plea agreements in which defendants waive their rights to appellate and postconviction review of sentencing errors).

<sup>19</sup> See *Blakely*, 542 U.S. at 318 (O'Connor, J., dissenting) (resisting an expansive reading of jury trial rights because of concerns that states would respond poorly to a ruling that "exact[s] a substantial constitutional tax" on the adoption of a structured sentencing system). Capital sentencing is an exception that may perhaps prove the rule. An extraordinary amount of procedure, time, energy, and money are expended to resolve a very small number of capital cases. Because the financial costs of death penalty cases are so high, defense lawyers are chronically underfunded, and some jurisdictions cannot pursue death penalty cases because the price tag is too high. See Costs of the Death Penalty, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?did=108&scid=7>.



defendants' liberty interests by exhibiting a healthy skepticism toward all criminal punishments, and especially toward those that are most oppressive.

But, though defendants' pretrial and trial rights have long received much attention, their sentencing rights and the unique sentencing dynamics that affect defendants' interests have not. Defendants at sentencing are situated quite differently from those awaiting trial.<sup>20</sup> By sentencing, a judge or jury has already found the defendant guilty beyond a reasonable doubt or the defendant has admitted guilt through a plea. At issue is how the state will treat the proven wrongdoer. Thus, safeguards for the innocent are no longer essential, and legislatures, courts, and prosecutors may feel more comfortable with procedural shortcuts. As a result, sentencing power has often favored the state, and even seemingly neutral sentencing rules may tilt the system toward over-punishment. The Supreme Court's modern rejuvenation of jury-trial rights at sentencing bespeaks a new attentiveness to these concerns.<sup>21</sup>

Due process principles provide defendants substantial protections throughout the criminal process. At its core, due process requires "reasonable notice and an opportunity to be heard."<sup>22</sup> Notice is not simply about reducing defendants' shock. As *Apprendi* recognized, defendants need clear notice so that they can prepare their defenses.<sup>23</sup> They need this notice not simply in time for sentencing, but in time to make intelligent decisions about pleading guilty or going to trial.<sup>24</sup> Advance notice, effective assistance of counsel, and hearing procedures promote adversarial testing of the evidence. A predictable, transparent process exposes weak evidence and reduces the importance of back-channel communications and well-connected defense counsel.

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<sup>20</sup> See Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771, 1855–58 (2003).

<sup>21</sup> See, e.g., *Blakely*, 542 U.S. at 313–14 (asserting that the "Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbours" and emphasizing that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment"); *Booker*, 543 U.S. at 237 (Stevens, J., opinion of the Court) (explaining the importance of interpreting the Sixth Amendment to ensure the "jury would still stand between the individual and the power of the government under the new sentencing regime[s]" that governments have recently instituted).

<sup>22</sup> *Oyler v. Boles*, 368 U.S. 448, 452 (1962); *accord* *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Other provisions of the Bill of Rights go out of their way to guarantee notice of charges. U.S. CONST. amend. V (requiring grand jury indictment or presentment for every "capital, or otherwise infamous crime"), amend. VI (guaranteeing defendants "[i]n all criminal prosecutions . . . the right . . . to be informed of the nature and cause of the accusation"); see *Schmuck v. United States*, 489 U.S. 705, 718 (1989) (explaining that one of the key purposes of the Fifth Amendment's Grand Jury Clause is to give defendants notice of the charges they face).

<sup>23</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (quoting W.N. WELSBY, ARCHBOLD'S PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862)); see *United States v. Simmons*, 96 U.S. 360, 362 (1877).

<sup>24</sup> Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1173–77 (2001).

## B. Crude Constitutional Jurisprudence

In the *Appendi* line of cases, unusual, shifting coalitions of Justices have produced a puzzling modern sentencing jurisprudence. The surprising alliances and unexpected doctrines flow from venerable competing principles. Unfortunately, rather than carefully exploring these competing principles, the Court has embraced formalistic doctrines that can create more problems than they solve. The Court's new hyper-regulation of sentencing follows a long period in which the Court failed to show much concern for sentencing procedures. The Court's tradition of under-regulation, as well as its modern over-regulation, has hindered legislatures' and others' development of sound sentencing structures.

### 1. A Tradition of Under-Regulation

Before *Appendi*, the Supreme Court adopted a hands-off approach to non-capital sentencing procedure. In *Williams v. New York*, the Court held that defendants have no constitutional right to confront or cross-examine the witnesses against them at sentencing.<sup>25</sup> *Williams* stressed that rehabilitation had become an important goal of criminal justice, so "the punishment should fit the offender and not merely the crime."<sup>26</sup> Because sentencing requires judgments that go beyond the offender's "guilt of a particular offense,"<sup>27</sup> judges need "the fullest information possible concerning the defendant's life and characteristics," including hearsay. Sentencing judges should not have to adhere strictly to trial procedures and rules of evidence, which might keep them from learning important information about defendants' backgrounds.<sup>28</sup> State legislatures had chosen to grant sentencing judges broad discretion, *Williams* recognized, and requiring formal procedures could be unwise and inefficient. Intriguingly, the *Williams* Court also recognized that the rehabilitative ideal and its (lack of formal) procedures could benefit individual defendants as well as society.<sup>29</sup>

Even as the Warren Court greatly expanded criminal defendants' pre-trial and trial rights, it continued to cite *Williams* favorably and to suggest that sentencing needed little regulation.<sup>30</sup> The Supreme Court did recognize defendants' rights to an

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<sup>25</sup> 337 U.S. 241, 247-48 (1949).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 246-48.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 249 (suggesting that allowing judges to better understand offenders' characteristics and circumstances has "not resulted in making the lot of offenders harder" and stressing that "a strong motivating force . . . has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship").

<sup>30</sup> See, e.g., *Chaffin v. Stynchcombe*, 412 U.S. 17, 21-25 (1973) (reviewing *Williams* while stressing "the need for flexibility and discretion in the sentencing process"); *North Carolina v. Pearce*,

attorney at sentencing and to discovery of evidence that could affect sentences.<sup>31</sup> But the Court repeatedly stated that at sentencing “a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.”<sup>32</sup>

Meanwhile, in the 1960s and 1970s, scholars and criminal justice professionals began to criticize broad judicial sentencing discretion. Evidence suggested that similar defendants often received dissimilar sentences, and some studies found sentence disparities that correlated with offenders’ race, sex, and wealth.<sup>33</sup> Troubled by disparities, the specter of discrimination, rising crime, and the inefficacy of rehabilitation, criminal-justice experts proposed broad sentencing reforms to improve consistency and certainty.<sup>34</sup>

Legislatures soon listened. Through the late 1970s and early 1980s, a few state legislatures structured sentencing decision-making by passing determinate sentencing statutes, which abolished parole and created presumptive sentencing ranges for various classes of offenses.<sup>35</sup> At about the same time, Minnesota, Pennsylvania, and

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395 U.S. 711, 723 (1969) (favorably citing *Williams* while stressing “the freedom of a sentencing judge” to consider a defendant’s post-conviction conduct in imposing a sentence); *United States v. Grayson*, 438 U.S. 41, 45–54 (1978) (discussing *Williams* favorably while noting the few limits on the gathering of information for sentencing and a judge’s broad discretion to consider a wide range of information in arriving at an appropriate sentence); see also *Pearce*, 395 U.S. at 742 (Black, J., concurring in part and dissenting in part) (noting that the Supreme Court has “continued to reaffirm” *Williams* and its “reasons for refusing to subject the sentencing process to any [significant procedural] limitations, which might hamstring modern penological reforms”).

<sup>31</sup> See *Mempa v. Rhay*, 389 U.S. 128 (1967) (right to counsel); *Brady v. Maryland*, 373 U.S. 83 (1963) (right to discovery of evidence helpful to the defense).

<sup>32</sup> *Grayson*, 438 U.S. at 50 (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)); see also *Roberts v. United States*, 445 U.S. 552, 556 (1980) (reaffirming as a “fundamental sentencing principle” that “a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come”) (quoting *Grayson* and *Tucker*).

<sup>33</sup> See, e.g., Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895–97 & nn.73–84 (1990) (detailing studies showing widespread, unwarranted sentencing disparities, including those correlated with race, sex, and wealth); Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272–74 (1977) (reviewing studies and asserting that “the data on unjust sentencing disparity have indeed become quite overwhelming”); William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 359–62 (1991) (reviewing studies revealing the impact of racial discrimination at sentencing).

<sup>34</sup> See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972); NAT’L CONFERENCE OF COMMISSIONERS ON UNIF. STATE LAWS, *MODEL SENTENCING AND CORRECTIONS ACT* (1979); PIERCE O’DONNELL ET AL., *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM* (1977); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); DAVID FOGEL, “WE ARE THE LIVING PROOF:” THE JUSTICE MODEL FOR CORRECTIONS (1975).

<sup>35</sup> See MICHAEL H. TONRY, U.S. DEP’T OF JUSTICE, *SENTENCING REFORM IMPACTS* 77–85 (1987); U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *NATIONAL ASSESSMENT OF STRUCTURED SENTENCING* 14–17 (1996) [hereinafter *STRUCTURED SENTENCING*] (discussing move to determinate sentencing in various jurisdictions).

Washington created sentencing commissions and sentencing guidelines.<sup>36</sup> The federal government soon passed the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission to develop federal sentencing guidelines.<sup>37</sup> And over the next two decades, many more states adopted some form of structured sentencing by enacting mandatory sentencing statutes or by creating sentencing commissions to develop comprehensive guideline schemes.<sup>38</sup>

Modern sentencing reforms have repudiated rehabilitation as a dominant goal of sentencing. Many structured sentencing laws, including many guideline sentencing systems and severe mandatory minimum sentences, are designed principally to deter, incapacitate, and punish offenders. These structured sentencing reforms have focused sentencing determinations more on offense conduct. They tend to leave much less room for judicial consideration of various aspects of a defendant's background and characteristics.

Despite these significant determinate-sentencing reforms, for decades the Supreme Court refused to recast its sentencing doctrines. In *McMillan v. Pennsylvania*, the Court largely reiterated *Williams* in declining to regulate judges' consideration of factors that trigger mandatory minimum sentences.<sup>39</sup> The Court in *McMillan* rejected the defendant's arguments for greater procedural protections at sentencing by repeatedly stressing federalism and separation-of-powers concerns. State legislatures, it reasoned, need freedom to devise approaches to sentencing without significant constitutional limitations.<sup>40</sup>

Rendered in 1986, when many legislatures and sentencing commissions were starting to explore sentencing reforms, *McMillan* could have modernized sentencing law and spurred effective regulation of procedures. But with the *McMillan* Court instead stressing "tolerance for a spectrum of state procedures," legislatures and commissions neglected procedural safeguards when reforming substantive sentencing rules.

In the decade after *McMillan*, the Supreme Court consistently rejected federal defendants' arguments for enhanced procedural rights under the federal sentencing guidelines.<sup>41</sup> And in *United States v. Watts*, the Court approved mandatory sentence

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<sup>36</sup> See 1978 MINN. LAWS ch. 723 (enabling statute); 204 PA. CODE § 303 (1982) (set out following 42 PA. CONS. STAT. ANN. § 9721); WASH. REV. CODE ANN. § 9.94A.905 (West 1988).

<sup>37</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

<sup>38</sup> See Frase, *State Sentencing Guidelines*, *supra* note 3, at 1190 (2005) (surveying state sentencing guideline systems); DALE PARENT ET AL., KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: MANDATORY SENTENCING I (Nat'l Inst. of Justice Jan. 1997) (noting that "[b]y 1994, all 50 States had enacted one or more mandatory sentencing laws, and Congress had enacted numerous mandatory sentencing laws for Federal offenders").

<sup>39</sup> 477 U.S. 79, 91-92 (1986) (approving a Pennsylvania statute that provided for a five-year mandatory minimum sentence if a judge found, simply by a preponderance of evidence, that an offender visibly possessed a firearm while committing certain offenses).

<sup>40</sup> *Id.* at 84-91.

<sup>41</sup> See, e.g., *Witte v. United States*, 515 U.S. 389 (1995); *Nichols v. United States*, 511 U.S. 738 (1994); *United States v. Dunnigan*, 507 U.S. 87 (1993); *Wade v. United States*, 504 U.S. 181 (1992).

enhancements based on conduct of which defendants have already been acquitted at trial, so long as the government proved that conduct by a preponderance of the evidence at sentencing.<sup>42</sup> Remarkably, *Watts* parroted *Williams*'s statement about judges' need for full information about defendants.<sup>43</sup> But *Watts* did not discuss or even acknowledge (1) *Williams*' grounding in the rehabilitative model of sentencing, nor (2) that the federal guideline at issue concerned only offense conduct and not any aspect of the offender's "life and characteristics."

In *McMillan* and *Watts*, the Supreme Court essentially ignored modern sentencing reforms or at least treated them as irrelevant to constitutional regulation. Federalism and separation of powers were paramount. Defendants' rights received little formal protection even as sentencing determinations grew more rigid and harsh.<sup>44</sup>

## 2. A Sharp (But Opaque) Turn Toward Over-Regulation

All of a sudden, around the turn of the century, the Supreme Court started to express considerable concerns with traditionally lax sentencing procedures. For several years, the Court wrestled with whether the Due Process Clause and the Sixth Amendment's notice and jury-trial provisions require greater procedural safeguards at sentencing.<sup>45</sup> Finally, in 2000, *Apprendi v. New Jersey* interpreted these provisions to require that juries find beyond a reasonable doubt all facts (except a prior conviction) that increase statutory maximum sentences.<sup>46</sup>

*Apprendi* resulted from the collision of the Supreme Court's own criminal procedure revolution and reformers' substantive sentencing revolution. In other areas, historic concerns for federalism and separation of powers gave way to a more active role for the Court in safeguarding criminal defendants' individual rights. Meanwhile, modern sentencing reforms made sentencing more trial-like, particularly by resting many sentencing decisions on specific offense facts. In addition, because guilty pleas resolve most cases, sentencing typically has served as the only trial-like procedure for most defendants.<sup>47</sup> Against the backdrop of these developments, *Apprendi* was the

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<sup>42</sup> 519 U.S. 148, 151–55 (1997).

<sup>43</sup> *Id.* at 151–52.

<sup>44</sup> Foreshadowing his work in *Apprendi* and *Booker*, Justice Stevens delivered passionate dissents in *McMillan* and *Watts*. See *Watts*, 519 U.S. at 159 (Stevens, J., dissenting); *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting). In his *Watts* dissent, Justice Stevens noted that the "goals of rehabilitation and fairness served by individualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution." He complained about the Court's continued reliance on *Williams*, since "its rationale depended largely on agreement with an individualized sentencing regime that is significantly different from the Guidelines system." 519 U.S. at 165–70.

<sup>45</sup> See *Jones v. United States*, 526 U.S. 227 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

<sup>46</sup> 530 U.S. 466, 476 (2000) (opinion of five-Justice majority, comprising Justices Stevens, Scalia, Souter, Thomas, and Ginsburg).

<sup>47</sup> See *Bibas*, *supra* note 24, at 1149–50 (stressing significance of prevalence of guilty pleas in the

Court's landmark recognition that defendants' rights should sometimes trump other interests at sentencing.

Unfortunately, Justice Stevens' opinion for the Court in *Apprendi* never grappled conceptually with the impact of modern structured-sentencing reforms. Instead of highlighting that *Williams* rested upon the old, offender-oriented rehabilitative model of sentencing, *Apprendi* simply reaffirmed *Williams*' holding that judges could exercise broad discretion within statutory sentencing ranges.<sup>48</sup> The upshot seemed to be a formal and binary jurisprudence: those sentencing factors that raised maximum sentences required full-blown trial protections, while other factors triggered almost no constitutional regulation.

Lower courts struggled to determine *Apprendi*'s reach and import. Construed broadly, it cast constitutional doubt on many sentencing statutes and guidelines that called for judges to find certain facts at sentencing. *Apprendi* generated much litigation, but lower federal and state courts typically construed *Apprendi* narrowly in an effort to preserve existing sentencing structures.<sup>49</sup>

The Supreme Court itself significantly restricted *Apprendi*'s reach in *United States v. Harris*. In *Harris*, the Court reaffirmed *McMillan* and held *Apprendi* inapplicable to facts that trigger mandatory minimum penalties.<sup>50</sup> *Harris* marked the first time the Court explored modern sentencing reforms in depth.<sup>51</sup> For Justice Kennedy and the *Harris* plurality, however, recent sentencing reforms did not require rethinking *Williams* and *McMillan*. Rather, modern reforms provided a practical reason to reaffirm these precedents, because legislatures and voters had relied on them when instructing sentencing judges to find certain facts in new sentencing systems. Separation-of-powers concerns, the *Harris* plurality suggested, favored giving legislatures leeway to allow judges to find facts in setting minimum sentences.<sup>52</sup>

Though *Harris* acknowledged modern sentencing reforms and relied on structural and practical principles, it remained conceptually puzzling. Justice Breyer, in providing the key fifth vote in *Harris*, stated that he could not easily see a distinction between *Harris* and *Apprendi*. Moreover, the plurality stated that "the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings."<sup>53</sup> The reference to "judicial expertise" harkens back to the old-world sentencing model, in which judges were expected to use their unique insights to craft

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criminal justice system).

<sup>48</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000).

<sup>49</sup> See generally Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003).

<sup>50</sup> 536 U.S. 545, 558 (2002).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 567.

<sup>53</sup> *Id.*

an individualized, offender-oriented rehabilitative sentence.<sup>54</sup> Within modern structured sentencing systems, however, often “the judge is ‘just’ another fact finder, doing precisely what the jury does: finding facts with specific and often harsh sentencing consequences.”<sup>55</sup> It makes little sense to speak in this setting of reliance on “judicial expertise” for making offense-based factual findings. Nevertheless, *Harris* seemed to confirm that the *Apprendi* rule would be formalistic and binary, with some sentencing facts receiving full-blown trial protections and others receiving almost none.<sup>56</sup>

Just when *Harris* seemed to still the waters, *Blakely* roiled them again. *Blakely* extended *Apprendi*’s rule to facts that raise the maximum sentences judges may impose under statutory sentencing guidelines.<sup>57</sup> In his opinion for the Court, Justice Scalia explained that *Blakely*’s rule is necessary “to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.”<sup>58</sup> He concluded by insisting that “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”<sup>59</sup>

Justice Scalia’s majority opinion in *Blakely* began to outline a conceptual argument for giving juries more sentencing power: It discussed the jury as a democratic institution, explained the Sixth Amendment as a “reservation of jury power,” and disparaged “the civil-law ideal of administrative perfection.”<sup>60</sup> *Blakely* did not, however, examine how its principles squared with the many precedents that had previously championed judges’ role and authority at sentencing. Like *Apprendi*, *Blakely* did not seriously question either the old-world, judge-centered *Williams* decision or the more recent judge-friendly precedents of *McMillan* and *Harris*. Instead, *Blakely* summarily distinguished *Williams*, *McMillan*, and *Harris* in a few brief sentences. Similarly, *Blakely* restated *Apprendi*’s exception for prior convictions but did not deign to mention or cite *Almendarez-Torres*, the basis of the exception.

<sup>54</sup> See *supra* Part I.B.1.

<sup>55</sup> Nancy Gertner, *What Has Harris Wrought*, 15 FED. SENT’G REP. 83, 83–85 (2002); see also *United States v. Mueffelman*, 327 F. Supp. 2d 79 (D. Mass. 2004) (noting that, after a prosecutor makes a variety of discretionary charging and bargaining choices, the judge’s role is “transformed to ‘just’ finding the facts, now with Commission-ordained consequences”).

<sup>56</sup> Gertner, *supra* note 55, at 84. On the same day that the Supreme Court decided *Harris*, it also expanded *Apprendi*’s reach in *Ring v. Arizona*, 536 U.S. 584 (2002), by holding that capital defendants are “entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Id.* at 588. Most jurisdictions, however, already relied on jury sentencing in capital cases, and *Ring* had no impact on non-capital cases, which are far more numerous. *Harris*’s limit on procedural requirements for imposing minimum sentences seemed to be far more important in restricting *Apprendi*’s scope.

<sup>57</sup> *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

<sup>58</sup> *Id.* at 305–06.

<sup>59</sup> *Id.* at 313 (emphasis in original).

<sup>60</sup> *Id.* at 305–13. See *infra* Part II for an effort to give a conceptual account of the principles behind *Blakely*.

*Blakely* ignored *Watts*, which conflicted with *Blakely* in holding that judges could find facts to increase federal guideline sentences if proven by a preponderance of the evidence.

Much of Justice Scalia's majority opinion, rather than grounding *Blakely*'s rule in a coherent principle, simply mocks the dissents' lack of a coherent alternative. The *Blakely* dissenters, however, were more focused on *Blakely*'s practical consequences. Instead of continuing to rely on informal, judge-centered procedures, structured sentencing would immediately have to grant defendants the full panoply of jury-centered adversarial procedures. All three dissents lamented the "disastrous," cataclysmic disruption they foresaw as a result.<sup>61</sup>

Justice Scalia gave only a terse, tepid response to the dissents' concerns about *Blakely*'s impact. He said simply: "we are not . . . finding determinate sentencing schemes unconstitutional. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."<sup>62</sup> And, in response to the dissents' fears that *Blakely*'s sweeping rule would invalidate the federal sentencing guidelines, Justice Scalia said only, in a footnote, that the Court was expressing no opinion on that question.<sup>63</sup>

In *Apprendi* and *Blakely*, the Court did a remarkable about-face from its work in *McMillan* and *Watts*. In these more recent decisions, federalism and separation of powers took a back seat to the historic role of the jury in criminal justice. Concerns about defendants' rights trumped structural principles and practical considerations. Yet, somehow, *McMillan* and *Watts* formally remained good law. All the pieces of the Court's sentencing jurisprudence had a strange and uncomfortable fit.

### 3. The Curious Compromises in *Booker*

Though most observers expected that *Blakely* would extend to invalidate the federal sentencing guidelines, the Court's ruling in *Booker* still confounded legal observers. *United States v. Booker* held that the federal sentencing guidelines violated the Sixth Amendment's jury-trial guarantee because they raised maximum guideline sentences based on judicial findings of fact.<sup>64</sup> The Court did not, however, remedy this problem by guaranteeing juries a larger role in federal sentencing. Rather, Justice Ginsburg defected from the merits majority. She joined the *Blakely* dissenters to remedy Sixth Amendment problems by declaring the federal sentencing guidelines "effectively advisory."<sup>65</sup> The bizarre remedy for too much judicial fact-finding at

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<sup>61</sup> *Id.* at 314, 324–26 (O'Connor, J., dissenting); *id.* at 326–28 (Kennedy, J., dissenting); *id.* at 344–47 (Breyer, J., dissenting).

<sup>62</sup> *Blakely*, 542 U.S. at 308.

<sup>63</sup> *Id.* at 305 n.9.

<sup>64</sup> 543 U.S. 220 (2005) (merits majority opinion by Justice Stevens, joined by Justices Scalia, Souter, Thomas, and Ginsburg).

<sup>65</sup> *Id.* at 258–65 (remedial majority opinion by Justice Breyer, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy and Ginsburg).



sentencing was to keep judges' sentencing role in place and loosen the constraints on it. The decision effectively endorsed the lax sentencing procedures that the federal system had used for two decades even while finding those procedures constitutionally problematic.

*Booker's* reasoning suggested a profound conceptual confusion. On the one hand, in *Booker's* merits opinion, Justice Stevens spoke grandly of "guaranteeing that the jury would still stand between the individual and the power of the government."<sup>66</sup> On the other hand, he favorably cited the old-world *Williams* decision and declared that the Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."<sup>67</sup> The continued approval of *Williams* and judicial fact-finding in discretionary sentencing systems contradicts the spirit of jury decision-making endorsed in *Apprendi* and *Blakely*.<sup>68</sup> Justice Stevens' merits majority opinion suggested that giving sentencing judges even more discretion remedies any Sixth Amendment problems.<sup>69</sup> This suggestion amounted to a blueprint for eviscerating jury rights at sentencing.

Of course, Justice Breyer's remedial majority opinion followed this blueprint exactly by revising federal sentencing to rely fully on judicial fact-finding within an advisory guidelines scheme. Justice Breyer's advisory guideline remedy was expressly designed to permit federal judges to retain broad authority to find facts at sentencing. The remedial majority opinion noted many problems with trying to inject juries into the federal guidelines. Sentencing judges, Justice Breyer contended, must be able to consider information learned after verdict and to base sentences on uncharged conduct.<sup>70</sup> Nearly two years' worth of experience with advisory guidelines has shown that the *Booker* remedy has succeeded in keeping judges empowered and juries marginal in the federal sentencing system. In the wake of *Booker*, federal judges continue to do all the fact-finding that the advisory guidelines recommend according to the same old lax sentencing procedures.

The dual rulings in *Booker* reflect two divergent conceptual and procedural models competing for dominance. Justice Stevens' merits majority opinion discussed

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<sup>66</sup> *Id.* at 237 (merits majority opinion).

<sup>67</sup> *Id.* at 233.

<sup>68</sup> See Kevin Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1096 (2005) ("To many, the two lead opinions in *Booker* have seemed incomprehensible when read side by side. . . . [T]he Court's body of precedent is inherently schizophrenic as long as *Blakely*, on the one hand, and *Williams*, on the other, cohabit the same legal universe."); see also Kyron Huigens, *Solving the Williams Puzzle*, 105 COLUM. L. REV. 1048, 1051–52 (2005) (explaining why the embrace of *Williams* "seems almost impossible to square with the logic of *Apprendi* [because it seems] paradoxical to impose constitutional limits on sentencing that is governed by rules, while permitting sentencing that is not governed by rules to escape all constitutional constraint").

<sup>69</sup> Cf. Reitz, *supra* note 68, at 1119 ("If the Justices are serious about an underlying theory of jury control in punishment (equivalent to voter control in elections), then judicial fact finding under *Williams* is much more offensive to Sixth Amendment values than the confined and transparent judicial powers exercised in *Blakely* and *Booker*.").

<sup>70</sup> *Booker*, 543 U.S. at 254–56.

how modern sentencing reforms affect procedural rights, suggesting that the Court should develop more procedural protections at sentencing. As sentence enhancements have become more important, judges have gained power and juries have lost it. The Court, Justice Stevens argued, had to take steps to “preserv[e this] ancient guarantee under a new set of circumstances.”<sup>71</sup>

Justice Ginsburg’s defection, however, allowed Justice Breyer to craft a remedy that endorses the continued use of relatively lax, judge-driven sentencing procedures. Justice Breyer’s conceptual goal was not to provide individual defendants with jury safeguards, but rather to promote greater uniformity in sentencing outcomes.<sup>72</sup> The two opinions almost speak two different languages. One frets about safeguarding juries, checking government power, and shoring up constitutional rights. The other pragmatically evaluates modern reforms, the need for expertise, and the importance of uniform outcomes.

## II. A FUNCTIONAL BALANCE OF PRINCIPLES AND PRACTICES

Though the Supreme Court’s almost spasmodic impulses have produced crude, opaque sentencing doctrines, *Williams*, *McMillan*, *Apprendi*, *Blakely*, and *Booker* contain the seeds of a more nuanced sentencing jurisprudence. Trials and sentencings differ because juries and judges have different roles and abilities; procedural safeguards should track these distinctions.

### A. Differences Between Trials and Sentencings, Juries and Judges

*Williams* rightly began modern sentencing law by emphasizing the essential difference between trials and sentencings. Trial determines a defendant’s guilt; sentencing prescribes an offender’s fate.

Trials are backward-looking, offense-oriented events. Typically, trial disputes center on particular issues of historical fact. These include whether the defendant was the person who committed an act, what the defendant’s mental state was, or whether the defendant used a weapon or inflicted a particular injury. Sometimes trial disputes also involve value judgments specified by legislatures to differentiate degrees of criminality. For example, whether a particular homicide is murder or provoked voluntary manslaughter often calls for a normative judgment as well as a factual assessment. Decision-makers receive limited information and must choose from limited options to resolve disputed issues. Often the choices at trial are simple, binary ones that frame the wrongfulness of the defendant’s acts.

Sentencing, in contrast, involves assessing a particular offender after a trial or plea has resolved basic disputes about guilt and degrees of criminality. Sentencing necessarily incorporates offender-oriented considerations, many of which are forward-

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<sup>71</sup> *Id.* at 237 (merits majority opinion).

<sup>72</sup> *See id.* at 253–58 (remedial majority opinion).

looking. Though sentencing judgments often consider how and why the crime was committed, the focus is different and broader. The concern is no longer simply what happened during a crime, but also what to do with the convicted criminal in light of his, the victims', and society's needs. The decision-maker receives a range of information about both the offense and the offender and can choose from various possible dispositions. Sentencing requires the use of reasoned judgment to impose a just and effective punishment. And whereas a defendant's background and the criminal justice system's purposes would be distracting or prejudicial at trial, they are key considerations at sentencing.

A jury can participate effectively at trial. Determinations of basic guilt may require careful examination of evidence about what happened and call for broad-brush normative judgments about wrongdoing. Jurors, who represent community values and exercise practical wisdom, are suited to this task. Juries not only have a historic, constitutional role in deciding guilt, but also bring democratic legitimacy, common sense, and fresh perspectives.

Judges, in contrast, are repeat players with more information about criminal justice purposes and practicalities. Thus, they necessarily have broader insights about punishment options and how to sentence effectively. Punishment decisions may require assessing an offender's background and how best to respond to it in light of available sentencing alternatives and the typical treatment of other offenders. Judges can bring their unique expertise and appreciation of competing punishment policies to this task. In short, judges are more flexible, expert, can better apply complex rules, and can try to equalize outcomes across a range of cases.

### *B. Building a More Nuanced Sentencing Jurisprudence*

A nuanced sentencing jurisprudence should attend to the core differences between trials and sentencings and between juries and judges. It also needs to respect the adversarial relationship between the state and criminal defendants at sentencing. In so doing, sentencing jurisprudence can better effectuate and balance the many competing principles developed in Part I above.

#### *1. Right to a Jury Trial<sup>73</sup>*

The application of the jury trial right need not be formal and binary, with full-blown jury trials for all facts that raise maximum sentences and almost no safeguards for all other sentencing factors. Instead, the Court should recognize a jury-trial right for all facts that relate to offenses, but not offender facts nor exercises of reasoned judgment. The text of the Constitution, juries' historic roles and competences, *Almendarez-Torres*' special treatment of recidivism facts, and separation of powers and federalism concerns support these distinctions.

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<sup>73</sup> Much of this Subsection is adapted from Douglas A. Berman, *Conceptualizing Blakely*, 17 FED. SENT'G REP. 79 (2004) and Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387.

*a. An Offense/Offender Distinction.* The Supreme Court should ground its *Apprendi-Blakely* Sixth Amendment work in the constitutional text it purports to be applying. The jury-trial right at issue actually appears twice in the U.S. Constitution. Section 2 of Article III provides: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” And the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”

The Constitution provides the jury-trial right for “Crimes,” which are the basis for “prosecutions” of “the accused.” This language connotes that the jury-trial right attaches to all *offense conduct* that the state seeks to punish criminally. The language also suggests that the jury-trial right does not attach to any *offender characteristics* that the state may deem relevant to criminal punishment. That is, those facts, and only those facts, relating to offense conduct that is by law a basis for criminal punishment are subject to the jury-trial right. These facts are the essential parts of those “Crimes” with which the state charges “the accused” in “criminal prosecutions.”<sup>74</sup>

The jury-trial right attaches to *offense conduct* and not *offender characteristics* because the state defines “crimes,” accuses, and prosecutes based on what people do and not who they are. When the law ties punishment to specific conduct, such as the amount of money or drugs, weapon use, or injury, the state has defined particular behavior that merits criminal stigma and punishment. A defendant has a right to demand that before he is punished, a jury find each and every one of the facts central to offense conduct.

Once a jury trial or guilty plea has established offense conduct, a judge may consider whether offender characteristics call for more or less punishment of that conduct. When the law ties punishment to a defendant’s past and character, such as his criminal history, employment record, or age, the state is not defining criminal conduct. States should be able to structure judicial consideration of these offender characteristics through statutes or guidelines without involving juries.

In short, the jury-trial right attaches to offenses but not to offenders.<sup>75</sup> This offense/offender distinction, in addition to being suggested by the text of the Constitution, reflects juries’ and judges’ distinctive institutional competences. Juries can sensibly determine all offense conduct at trial, and the state can prove to a jury at trial all the specific offense conduct for which the state seeks to punish. Judges, however, are better positioned to consider potentially prejudicial information concerning an offender’s life and circumstances at sentencing.

In short, we “give intelligible content to the right of jury trial” by concluding that juries must find all the “facts of the *crime* the State *actually* seeks to punish.”<sup>76</sup> The

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<sup>74</sup> In this discussion, we intentionally avoid using the term “element” because the term has no clear constitutional pedigree but seems to carry much constitutional baggage.

<sup>75</sup> Perhaps to be more faithful to the constitutional text, we should describe this key point by distinguishing crimes from criminals. The offense/offender distinction, however, seems to be a clearer way to capture the same substantive point.

<sup>76</sup> *Blakely*, 542 U.S. at 305, 307 (first emphasis added).

state certainly may allow juries to find offender characteristics as well, but the Constitution's jury-trial right does not demand as much.<sup>77</sup> This approach not only fits with the constitutional text and institutional competences, but also has considerable practical appeal. As noted by the *Blakely* dissenters and many commentators, an extremely broad reading of the jury-trial right would greatly disrupt judge-based sentencing systems. The offense/offender distinction should give legislatures and sentencing commissions more administrative breathing room to (re-)design fair and effective sentencing systems. Juries, by finding all offense conduct, would still "function as circuitbreaker in the State's machinery of justice."<sup>78</sup> States, however, would still enjoy substantial freedom to structure the rest of sentencing decision-making without having to pay the "substantial constitutional tax" of jury fact-finding.<sup>79</sup>

The Supreme Court's prior-conviction exception to *Blakely* resonates with this offense/offender distinction. Prior convictions are the consummate *offender characteristic*. To have a prior conviction is not in and of itself a "crime," and the state cannot bring an "accusation" and pursue a "criminal prosecution" based only on the offender's criminal past. Thus, there should be no constitutional right to a jury trial on this fact.<sup>80</sup> Relatedly, several lower courts have considered an offense/offender distinction in an effort to limit *Blakely*'s reach.<sup>81</sup> And, before the *Blakely* line of cases, Hawaii's courts developed a similar distinction to determine which sentencing facts must be alleged in an indictment and found by a jury.<sup>82</sup> These developments in lower courts testify to how the distinction can organize and limit *Blakely*'s jury-trial right effectively.

*b. A Fact/Judgment Distinction.* Another important and distinguishing dimension of sentencing is the forward-looking role of judgment. *Booker* approved judicial fact-finding at sentencing in discretionary systems, but found problems with

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<sup>77</sup> As explained more fully *infra*, our discussion here addresses *only* the Constitution's jury-trial right. Other constitutional provisions might affect whether and how a judge can make various findings at sentencing.

<sup>78</sup> *Blakely*, 542 U.S. at 306.

<sup>79</sup> *Id.* at 318 (O'Connor, J., dissenting).

<sup>80</sup> Of course, a state is certainly permitted to provide for jury consideration of this offender circumstance; states are always free to provide more procedure and procedural protections to a defendant than the Constitution demands. The critical point is that the Constitution does not demand that such offender characteristics trigger the jury right because a defendant's prior convictions are offender facts, not offense facts.

<sup>81</sup> See *State v. Hanf*, 687 N.W.2d 659 (Minn. Ct. App. 2004); *New Jersey v. Abdullah*, 858 A.2d 19 (N.J. Super. App. Div.), *aff'd in part* 878 A.2d 746 (N.J. 2004). But see *State v. Warren*, 98 P.3d 1129 (Or. App. 2004) (rejecting an offense/offender reading of *Blakely*).

<sup>82</sup> See *State v. Schroeder*, 880 P.2d 192, 199–204 (Haw. 1994) (distinguishing facts "intrinsic to the commission of the crime charged," which must be alleged in an indictment and found by a jury, from facts "wholly extrinsic to the specific circumstances of the defendant's offense," which do not have to be alleged in an indictment or found by a jury); see also *State v. Mugaotega*, 114 P.3d 905, 913 (Haw. 2005) (discussing *Booker* and its impact on *Schroeder* and other pre-*Booker* Hawaii cases).

such fact-finding within structured systems. According to *Booker*, the Sixth Amendment permits only the jury to find those facts that will have fixed and predictable sentencing consequences. Judges may, however, still consider factors not adjudicated at trial when making discretionary sentencing decisions. This outcome does not vindicate jury involvement, because juries have little role at sentencing in discretionary systems. Rather, *Booker*'s rule makes much more conceptual sense as a way to ensure that sentencing remains defined by judges' exercise of reasoned judgment. In other words, *Booker* safeguards the notion of sentencing as a distinct criminal justice enterprise that requires the exercise of reasoned judgment, not just offense fact-finding.

In *Williams*, when the rehabilitative ideal still held sway, reasoned judgment justified allowing judges broad discretion to consider facts needed to craft effective sentences. The *raison d'être* for broad discretion in unstructured sentencing systems was to enable judges to exercise "their judgment toward a more enlightened and just sentence."<sup>83</sup> *Booker* likewise concerns itself with reasoned judgment in modern sentencing systems by distinguishing between roles for juries and judges. Juries are to find offense facts that mandate particular sentencing outcomes, based on a legislature's or sentencing commission's *ex ante* judgments. Judges are to exercise reasoned judgment at sentencing, *ex post*, based on relevant sentencing facts.<sup>84</sup> In other words, whenever offense facts have fixed and predictable sentencing consequences, then the jury, as the preferred fact-finder, must pass on them. Judges remain authorized, however, to consider a range of facts as part of exercising reasoned judgment at sentencing.

## 2. Due Process and Adversarial Justice

Sentencing jurisprudence must look beyond the jury-trial guarantees and recognize that sentencing has become another stage in an adversarial criminal justice system. Back when the law sought to cure "sick" offenders, the *Williams* Court could conclude it was in society's and the defendant's interest to rely on informal procedures. Now, however, sentencing is principally about retribution, deterrence, and incapacitation, not rehabilitation.

The modern evolution in punishment purposes has transformed sentencing into another fully adversarial stage of criminal justice. Thus, the full range of Bill of Rights protections designed to protect criminal defendants against oppressive state power must play larger roles. These provisions include the Sixth Amendment's right to adversarial processes, the Due Process and Equal Protection Clauses, and of course the Eighth Amendment.<sup>85</sup> The jury-trial right addresses only *who* makes certain

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<sup>83</sup> *Williams v. New York*, 337 U.S. 241, 251 (1949).

<sup>84</sup> Professor Kyron Huigens has recently explained and justified the *Apprendi-Blakely-Booker* line of decisions in a somewhat similar manner. Huigens, *supra* note 68, at 1051–52.

<sup>85</sup> See generally Frank O. Bowman, III, *Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment*, 17 FED. SENT'G. REP. 1 (2004) (criticizing *Blakely*'s

determinations, not *how* these determinations are made. The jury-trial right does not address applicable burdens of proof, notice requirements, or related procedural issues.

Although the Court occasionally alludes to due-process considerations at sentencing, none of the Court's recent rulings has addressed these issues clearly.<sup>86</sup> Importantly, though the offense/offender and fact/judgment distinctions are integral to the jury-trial provisions, they may not be central or even relevant to other constitutional provisions.<sup>87</sup> In light of modern adversarial sentencing dynamics, the Due Process Clause might require effective notice and perhaps heightened proof of all matters—whether offense or offender, fact or law—that significantly influence punishment.

Ultimately, the pitched battles in *Blakely* and *Booker* reflect competing conceptual visions of due process as the Court considers new constitutional rules for modern sentencing. Justices Stevens leads a faction of the Court concerned with safeguarding defendants' procedural rights in a modern adversarial sentencing system. Justices Scalia and Thomas are concerned with structural principles that the Framers designed to limit the power of the state. Justice Breyer leads a faction of the Court concerned with promoting uniform sentencing outcomes. The five Justices in the *Blakely* and *Booker* merits majorities rightly note the need to protect juries, limit state power, and ensure procedural fairness; the other Justices rightly consider uniformity, consistency, and efficiency. Unfortunately, each group is talking past the others, instead of engaging in dialogue about how to foster and balance competing goals. The next part addresses how best to apply these principles and goals to modern determinate sentencing systems.

### III. MODERN SENTENCING OPTIONS AND SENSIBILITIES

The modern sentencing reforms that *Apprendi* and *Blakely* have disrupted were driven not by constitutional requirements, but by policy, politics, and practical needs.

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interpretation of the Sixth Amendment in the course of developing a comprehensive theory of constitutional limits on sentencing procedures and outcomes). Cf. *Ring v. Arizona*, 536 U.S. 584, 614–19 (2002) (Breyer, J., concurring) (explaining his view that “jury sentencing in capital cases is mandated by the Eighth Amendment”).

<sup>86</sup> See Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 676–88 (2005) (explaining how “the Supreme Court’s reoriented sentencing jurisprudence has roots in the Due Process Clause of the Fifth and Fourteenth Amendments”); see also Jon Wool, *Aggravated Sentencing: Blakely v. Washington—Legal Considerations for State Sentencing Systems*, in VERA INST. OF JUSTICE, STATE SENT’G & CORRECTIONS, POL’Y & PRAC. REV., at 6 (Sept. 2004), available at [http://www.vera.org/publication\\_pdf/250\\_477.pdf](http://www.vera.org/publication_pdf/250_477.pdf) (noting that “a discussion of the due process clause was conspicuously absent in the *Blakely* opinion”).

<sup>87</sup> Cf. *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (concluding that the Fifth Amendment’s right against self-incrimination precludes a sentencing judge from “holding [a defendant’s] silence against her in determining the facts of the offense at the sentencing hearing,” while expressly not addressing whether a sentencing judge may constitutionally consider a defendant’s silence in a “determination of a lack of remorse, or upon acceptance of responsibility”) (emphasis added).

And though inattentive to some constitutional concerns, modern sentencing systems spotlight a range of options with which states can experiment.

The Supreme Court should inspire jurisdictions to keep innovating and improving their sentencing systems. Sadly, *Apprendi*'s, *Blakely*'s, and *Booker*'s opacity and insensitivity to local needs have provoked more resistance than respect. This Part suggests how the Roberts Court could better facilitate collaborative, constitutional, and sensible sentencing reforms.

#### A. *Varieties of Sentencing Schemes*

Courts and commentators tend to dichotomize sentencing schemes. Traditional discretionary sentencing systems, which are often called unstructured or indeterminate, give trial judges and parole boards nearly unfettered authority to select sentence lengths. More recent reforms, which are often called structured or determinate sentencing, give legislatures, sentencing commissions, and appellate courts larger and more formal roles in determining sentencing outcomes.

This dichotomy is not a false one, but it is far too neat. Sentencing schemes lie along a dynamic spectrum of discretion and guidance. More precisely, there are many dimensions or continua that empower and limit sentencing decision-makers and decision-making. The roles of legislatures, sentencing commissions, prosecutors, probation officers, trial judges, appellate judges, and parole officials vary widely. The mechanisms for informing, structuring, and checking discretion are manifold, and there are many types of rules and degrees of binding force.

This Part synthesizes earlier observations by examining sentencing possibilities in light of the principles, policies, and practical considerations discussed above. The rest of Section A sketches out the varieties of possible sentencing schemes, drawing on some historical models as a backdrop. Section B situates the California scheme at issue in *Cunningham* within this landscape. Section C then suggests, in light of Parts I and II, which of these options are constitutional and desirable and which are constitutionally and practically suspect.

##### 1. Historical Perspective

The history of American sentencing systems showcases the spectra of possibilities for structuring sentencing decision-making and distributing sentencing power. This history reveals that dynamic criminal justice systems move toward an informal balance of power, even when sentencing laws fail to foster formal balance and transparent decision-making.

Until the late eighteenth century, there was no separate sentencing phase for felonies. Statutes and common law prescribed fixed penalties for particular felonies, such as an automatic death penalty for grand larceny. Sentencing was essentially a ministerial act for the trial judge: once a jury convicted of a felony, the judge had little choice but to impose the prescribed punishment. Trial judges had little sentencing



discretion and thus little formal role in sentencing decision-making, for sentencing outcomes were largely fixed by common law or legislation.<sup>88</sup>

Even within a system dominated by formal legal rules, however, there was some measure of discretion and case-specific flexibility. Juries could sometimes factor sentencing consequences into their verdicts, perhaps at judges' urging. The judge could recommend that the executive grant clemency, by either pardoning the defendant or commuting his sentence. Judges also had discretion to order transportation to a penal colony or branding as alternative punishments for certain crimes, and they had wide discretion in misdemeanor cases.<sup>89</sup>

With the development of penitentiaries and the embrace of rehabilitation, American sentencing lurched from all law and no discretion to no law and all discretion. From the nineteenth through the mid-twentieth century, sentencing judges enjoyed almost unfettered discretion. Criminal statutes were modified to prescribe extremely broad ranges of imprisonment, sometimes from zero years to life. Sentencing judges were free to select any sentence within the range for any reason or no reason at all. They did not have to hear evidence, give reasons, or face appellate review.<sup>90</sup>

But even within a system dominated by discretion and a commitment to individualization, norms and customs developed to foster some system-wide consistency. Judges in certain courthouses would sometimes share information about sentencing practices and experienced litigants often knew the "going rate" for certain kinds of offenses and offenders. Parole boards often developed internal guidelines to help inform their judgments about when to release offenders before the expiration of their terms.<sup>91</sup>

In other words, even when the law first seemed inflexible and later seemed uninterested in ensuring consistency, actors developed informal means to foster balanced and nuanced justice. These informal measures, however, were often haphazard and not very visible. The most successful modern reforms have not only brought more formal balance to sentencing, but also made sentencing discretion more reasoned, transparent, and open to scrutiny.

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<sup>88</sup> See generally Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 306 (1994) (reviewing early American sentencing procedures); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892–93 (1990) (explaining that each crime had predetermined sentence).

<sup>89</sup> Bibas, *supra* note 24, at 1124–25 & n.204 (collecting sources).

<sup>90</sup> See FRANKEL, *supra* note 34; Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 572–73 (2005).

<sup>91</sup> See generally John C. Coffee, Jr., *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978).

## 2. Modern Sentencing Realities

Modern American sentencing systems have more formally balanced the structure of decision-making and the distribution of power. Unfortunately, the Supreme Court's modern sentencing jurisprudence has not been attentive to this development.

The opinions in the *Apprendi* line of cases often compare the two polar opposites of rigid sentencing law and complete sentencing discretion. The Justices in the majority, especially Justice Scalia, distrust judicial discretion. They flirt with the possibility that juries, not judges, should find all sentencing-related facts, or at least all aggravating facts.<sup>92</sup> They suggest that the only other alternative is a slippery slope down to lawlessness, with no meaningful limits on judicial discretion.<sup>93</sup>

The dissenters in the *Apprendi* line of cases seem to buy into this dichotomy. They rely upon *Williams* as solid precedent for a hands-off approach and seem largely untroubled by the lack of constitutional limits on judicial sentencing power.<sup>94</sup> They see modern structured sentencing as an improvement on broad sentencing discretion and fear that *Apprendi* and *Blakely* will stifle reforms.

There is, however, a vibrant spectrum in between judge-only and jury-only sentencing. Even if one focuses only on a single dimension, the relative power and discretion of these two actors, there are many intermediate options. For example, juries could find certain types of facts while judges find other types of facts.<sup>95</sup> Juries could perform fact-finding while judges make discretionary calls based on those facts.<sup>96</sup> Juries could render advisory recommendations on which judges could base their sentences.<sup>97</sup> Allocating these powers requires a series of tradeoffs that implicate a range of principles and practicalities. Juries provide democratic legitimacy, common sense, and fresh perspectives. Judges are experts, can more effectively and

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<sup>92</sup> See, e.g., *Blakely v. Washington*, 542 U.S. 296, 303, 309 (2004) (Scalia, J.) (holding that judges may impose only those sentences legally authorized “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,” and appearing to endorse “determinate jury-factfinding schemes” (emphases in original)); *Apprendi v. New Jersey*, 530 U.S. 466, 501 (2000) (Thomas, J., joined by Scalia, J., concurring) (contending that “a ‘crime’ includes every fact that is by law a basis for imposing or increasing punishment,” so juries must find these facts beyond a reasonable doubt).

<sup>93</sup> See *Blakely*, 542 U.S. at 306–08 (suggesting that only coherent alternative to *Blakely* would allow judges to bootstrap convictions for illegal lane-changing into punishments for murder); *Monge v. California*, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting) (suggesting that without *Apprendi*'s rule, defendants could be convicted of “knowingly causing injury” and then have judges jack up their punishments to life imprisonment).

<sup>94</sup> See, e.g., *Apprendi*, 530 U.S. at 525 (O'Connor, J., dissenting); *id.* at 557–58 (Breyer, J., dissenting).

<sup>95</sup> See *supra* Part II.B; *infra* Part III.C; Douglas A. Berman, *Conceptualizing Blakely*, 17 FED. SENT'G REP. 89, 89 (2004).

<sup>96</sup> Despite some broader dicta, *Apprendi* itself went only this far. *Apprendi*, 530 U.S. at 481–82 (relying on history of judges' exercising discretion within range set by jury's verdict).

<sup>97</sup> Cf. *Marshall v. Crosby*, 911 So. 2d 1129 (Fla. 2005) (discussing Florida's capital sentencing system, in which a jury can recommend life or death, but the judge only considers the jury recommendation when deciding whether to impose death or life).

consistently apply complex rules, and have flexibility in how they consider evidence and render decisions.

There is also a broad spectrum of rules in between complete legislative specification of punishments *ex ante* and discretionary selection of punishment *ex post*. Legislatures can enact mandatory minimum and maximum sentences that leave judges considerable sentencing discretion. Sentencing commissions can specify more fine-grained ranges with the same binding effect as legislative minima and maxima. Sentencing commissions or legislatures can specify presumptive ranges for ordinary cases and allow deviations for out-of-the-ordinary reasons, which they may specify in advance. The binding force of these rules may vary with the standard of appellate review, which can range from *de novo* to abuse of discretion. Appellate courts could also police compliance with sentencing procedures without policing substantive choices and outcomes. At the other end of the spectrum, guidelines may be completely voluntary and not even permit real appellate review. The force of such voluntary guidelines will depend on their wisdom and a range of sentencing norms.

A wide variety of actors can also take part in formulating sentencing policy and outcomes. *Ex ante*, legislatures may write rules directly, or they may delegate that power to unelected sentencing commissions. These commissions vary widely in their composition; they may comprise judges, legislators, prosecutors, defense counsel, probation and parole officers, academics, and even victims and convicts. Prosecutors' offices can create formal and informal plea and post-conviction policies that will shape sentencing outcomes. *Ex post*, trial judges may wield sentencing power on their own, or they may share it with juries. Prosecutors and defense counsel will make choices and put forward information that can influence sentencing decisions. Probation officers may interview witnesses, conduct research, and write presentence reports that serve as preliminary findings of fact and conclusions of law. Appellate courts, as noted, may police sentencing procedures and substantive outcomes with varying degrees of scrutiny. At the back end, parole boards and corrections officials may alter actual release dates, and their decisions may or may not be regulated by statutes or guidelines.

In modern times, states have explored and continue to embrace various options along these spectra. First, states vary widely in the roles they accord to juries. Six states routinely have juries sentence felons.<sup>98</sup> Many other states have juries handle all stages of capital sentencing while leaving non-capital sentencing to judges. Until the Supreme Court outlawed the practice, in nine states judges handled all stages of capital sentencing, though in four of these juries first rendered advisory verdicts.<sup>99</sup>

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<sup>98</sup> Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004) (listing Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia in this category).

<sup>99</sup> See *Ring v. Arizona*, 536 U.S. 584, 608 (2002) (naming Arizona, Colorado, Idaho, Montana, and Nebraska as states which "commit both capital sentence factfinding and the ultimate sentencing decision entirely to judges," and naming Alabama, Delaware, Florida, and Indiana as states which "have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations").

Some states, such as Kansas, comply fully with *Blakely* by having juries find all facts that raise guidelines maxima.<sup>100</sup> Other states and the federal government evade *Blakely* by having advisory guidelines operated by judges.<sup>101</sup> Some guidelines, most famously the federal guidelines, provide narrow sentencing ranges and incorporate many offense and offender characteristics.<sup>102</sup> Many other systems have much broader ranges and many fewer specific adjustments.<sup>103</sup> The breadth of ranges and paucity of adjustments give judges wiggle room and leaves much less work to juries.<sup>104</sup>

States also vary significantly in how much appellate courts police sentencing judges' decisions. Six states plus the federal government have searching appellate review.<sup>105</sup> Five other states have appellate review that is either lax or substantially limited in scope or extent.<sup>106</sup> Six states have guidelines that are voluntary provided that judges give reasons for departing from the guidelines.<sup>107</sup> In other words, appellate courts enforce procedural but not substantive sentencing rules. On the other hand, three or four jurisdictions' guidelines systems have no appellate enforcement.<sup>108</sup>

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<sup>100</sup> Kansas incorporated jury procedures after *Apprendi* and before *Blakely* for facts considering upward departures; see *State v. Gould*, 23 P.3d 801 (Kan. 2001). Furthermore, following *Gould*, Kansas changed the state guidelines to comply with *Apprendi* by statute; see KAN. STAT. ANN. 21-4716, 4718 (2006).

<sup>101</sup> E.g., *United States v. Booker*, 543 U.S. 220, 246, 259 (2005) (Breyer, J., remedial majority opinion) (invalidating binding force of federal guidelines instead of entrusting guideline fact-finding to juries).

<sup>102</sup> See 28 U.S.C. § 994(b)(2) (2006) (prescribing that if a guidelines sentence includes imprisonment, the top of the range may not exceed the bottom of the range by more than 25% or six months, whichever is greater, except that the top of the range may be life imprisonment if the bottom is at least thirty years); U.S. SENTENCING GUIDELINES MANUAL ch. 2, 3, 4 (2005).

<sup>103</sup> See, e.g., Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 428 (2000) [hereinafter Frase, *Is Guided Discretion Sufficient*] (describing Tennessee's guidelines ranges as "very broad"); Ronald Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUST. 39 (2002) (describing how North Carolina guideline system operates).

<sup>104</sup> See, e.g., Robert Weisberg, *Excerpts from "The Future of American Sentencing: A National Roundtable on Blakely"*, 2 OHIO ST. J. CRIM. L. 619, 640 (2005) (remarks of Barbara Tombs, Director, Minnesota Sentencing Comm'n) (reporting that because Minnesota has only about forty to sixty cases per year that raise statutory sentencing enhancement issues, it is not difficult to try these few factual issues to juries in bifurcated trials).

<sup>105</sup> Frase, *State Sentencing Guidelines*, *supra* note 3, at 1196 tbl. 1 (indicating that Alaska, Kansas, Minnesota, Ohio, Oregon, Washington, the federal system, and the 1993 ABA standards provide for full-fledged appellate review or other enforcement mechanism).

<sup>106</sup> Frase, *Is Guided Discretion Sufficient*, *supra* note 103 (noting that Pennsylvania's standard of review is quite lax, that some decisions in Florida and Ohio limit issues to be reviewed on appeal, and that North Carolina's and Tennessee's appellate case laws are quite limited).

<sup>107</sup> Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington—Practical Implications for State Sentencing Systems*, in VERA INST. OF JUSTICE, STATE SENT'G & CORRECTIONS, POL'Y & PRAC. REV., at 1, 5 (Aug. 2004), available at [http://www.vera.org/publication\\_pdf/242\\_456.pdf](http://www.vera.org/publication_pdf/242_456.pdf) (listing Arkansas, Delaware, Maryland, Rhode Island, Utah, and Virginia within this category).

<sup>108</sup> *Id.* at 5 (listing the District of Columbia, Louisiana, Missouri, and Wisconsin within this

Most unstructured-sentencing states fall into the same category, although some have retained parole to regulate sentences at the back end.<sup>109</sup>

States also use different institutional structures to create and maintain their sentencing rules. Traditionally, unstructured-sentencing states have left basic sentencing rules in the hands of legislatures, and legislatures assert authority on sentencing issues of particular concern. Some structured-sentencing systems follow the same route. For example, the California determinate-sentencing law at issue in *Cunningham* was enacted by the state legislature, as were Washington State's guidelines in *Blakely*.<sup>110</sup> Statutes that delegate power to commissions vary widely in how much guidance they provide and how much legislatures participate in guideline revision.<sup>111</sup> Some states created sentencing commissions temporarily to enact sentencing guidelines, but many have retained commissions permanently to update guidelines.<sup>112</sup> Commissions also vary widely in their composition and how politically insulated and responsive they are.<sup>113</sup> And, as noted in the previous paragraph, states vary widely in how much their appellate courts develop and police substantive and procedural sentencing doctrine.

Despite these variations, state sentencing systems have evolved toward consensus on many issues. As Richard Frase argues, state systems have many things in common. They leave room for evolution and revision of both their purposes and mechanisms.<sup>114</sup> Many entrust permanent sentencing commissions with monitoring success and proposing revisions.<sup>115</sup> These commissions are independent, yet they are often politically connected and responsive rather than insulated.<sup>116</sup> They predict

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category); Frase, *State Sentencing Guidelines*, *supra* note 3, at 1198 (implying that Missouri, Wisconsin, and the District of Columbia fall within this category); Frase, *Is Guided Discretion Sufficient*, *supra* note 103, at 446 tbl.1 (listing Louisiana's guidelines system as having been implemented in 1992 and rejected in 1995).

<sup>109</sup> See generally Steve Chanenson, *The Next Era of Reform*, 521 EMORY L.J. 377 (2005).

<sup>110</sup> CAL. PENAL CODE § 1170(b) (West 2006); WASH. REV. CODE ANN. § 9.94A.505 et seq. (West 2002).

<sup>111</sup> Frase, *State Sentencing Guidelines*, *supra* note 3, at 1197–98; see also Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 303–04 (2004) (describing Congress's initially broad delegation to U.S. Sentencing Commission and its increasing micromanagement by mandating or forbidding particular federal guideline amendments).

<sup>112</sup> See Frase, *State Sentencing Guidelines*, *supra* note 3, at 1196 tbl.1, 1197 (noting that Alaska's commission was designed to be temporary, while Florida, Michigan, and Tennessee's commissions were abolished once they finished writing their guidelines).

<sup>113</sup> For an extended discussion of these variations and the benefits of a politically responsive structure, see Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 754–98 (2005).

<sup>114</sup> Frase, *State Sentencing Guidelines*, *supra* note 3, at 1206.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; Barkow, *supra* note 113, at 754–98 (contending that the federal insulated-commission model has failed and that the more successful state commissions have been more politically involved, by for example, having legislators serve on them).

impacts on imprisonment and how guideline changes will affect prison resources.<sup>117</sup> They allow balanced input from legislatures, sentencing commissions, the parties, sentencing courts, appellate courts, and prison officials.<sup>118</sup> And they keep state guidelines simple and easy to apply.<sup>119</sup> In short, most modern sentencing reforms have more formally provided for balance and nuance in sentencing decision-making.

### B. *Exploring California's Chosen Option*

The California sentencing statute at issue in *Cunningham* is not a guidelines system, though it does seek to bring greater predictability and equality to sentencing. California's Determinate Sentencing Law prescribes a lower, middle, and upper term for each offense.<sup>120</sup> Each of these three terms provides for a particular number of years of imprisonment rather than a range.<sup>121</sup> Courts may impose statutory enhancements beyond these terms for particular offense characteristics or a prior criminal record. The prosecution must charge the enhancement and prove the enhancement facts to a jury beyond a reasonable doubt, unless the defendant admits the facts or waives a jury.<sup>122</sup> Otherwise, the trial judge must impose one of the three specified terms. The default or presumptive sentence is the middle term, unless there are additional aggravating or mitigating facts.<sup>123</sup> In order to select the upper term, the sentencing judge must find by a preponderance of the evidence that the aggravating facts outweigh the mitigating facts.<sup>124</sup> The judge may base these findings upon the probation officer's report or other reports, statements submitted by the parties or victim, and a sentencing hearing.<sup>125</sup> Before selecting an upper or lower term, the sentencing judge must find facts and state reasons on the record.<sup>126</sup>

On its face, this scheme violates *Blakely*. Before imposing an upper-term sentence, the sentencing judge must first find an aggravating fact beyond those found by the jury or admitted in the guilty plea.<sup>127</sup> No jury need find these facts beyond a reasonable doubt. Absent these jury findings, the middle term is thus the effective

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<sup>117</sup> Frase, *State Sentencing Guidelines*, *supra* note 3, at 1207.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1207–08.

<sup>120</sup> See CAL. PENAL CODE § 1170(a)(3) (West 2004).

<sup>121</sup> See e.g., *id.* § 288.5(a) (West 1999) (prescribing terms of six, twelve, or sixteen years' imprisonment for continuous sexual abuse of a child).

<sup>122</sup> *Id.* § 1170.1(e); *People v. Sengpadychith*, 27 P.3d 739, 745 (Cal. 2001).

<sup>123</sup> CAL. PENAL CODE § 1170(b) (West 2004).

<sup>124</sup> CAL. R. CT. 4.420(b) (West 2005).

<sup>125</sup> CAL. PENAL CODE § 1170(b) (West 2004).

<sup>126</sup> *Id.*; CAL. R. CT. 4.420(e) (West 2005).

<sup>127</sup> CAL. R. CT. 4.420(d) (West 2005) (providing that fact that is element of crime cannot support upper term).

statutory maximum.<sup>128</sup> One wonders at first how the California courts could have found otherwise.

Yet one can at least understand why the California Supreme Court thought *Blakely* should not apply. Much of *Apprendi* and *Blakely*'s reasoning rested on fear of slippery slopes and judicial power. Legislatures, the Court feared, were using enhancements to raise sentences, turn elements into sentencing factors, and undercut juries.<sup>129</sup> In enacting the Determinate Sentencing Law, however, California's legislature did not turn any elements into sentencing factors.<sup>130</sup> For the specific facts it singled out for sentence enhancements, the legislature required advance notice, jury trial, and proof beyond a reasonable doubt.<sup>131</sup> Otherwise, the legislature simply lowered overall sentences and structured judges' discretion within existing ranges. It provided an illustrative but not exhaustive list of aggravating and mitigating factors. It also required findings and statements of reasons on the record,<sup>132</sup> creating a record for appellate review. Far from undermining defendants' traditional jury rights, this scheme provides more notice, more procedural protections, and more safeguards against judicial arbitrariness. Thus, California's scheme illustrates the constructive role that legislative reforms can play. It also illustrates how the Court's overbroad bright-line rule endangers worthwhile reforms.

Tellingly, Justice Scalia suggested in *Blakely* that the Supreme Court had set forth a clear, bright-line rule about the reach of the Sixth Amendment.<sup>133</sup> Yet the Court's bright line has come packaged with an array of questionable, confusing exceptions. Kevin Reitz calls the Supreme Court's Sixth Amendment jurisprudence as "constitutional Swiss cheese."<sup>134</sup> Thus, it is not surprising that the California Supreme Court has asserted that the "high court's precedents do not draw a bright line."<sup>135</sup> *Booker* has poked another giant hole in *Blakely*'s bright line, and the Supreme Court's sentencing jurisprudence was conceptually muddled even before *Blakely* and *Booker* came along.

Further, *Blakely*'s bright line could be quite narrow or quite broad. The narrowest reading of *Blakely* suggests that judges may make all sorts of findings and judgments at sentencing, except that juries must make findings of historical fact

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<sup>128</sup> *Blakely v. Washington*, 542 U.S. 296, 303 (2004) ("the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*").

<sup>129</sup> See *id.* at 306–08; *Ring v. Arizona*, 536 U.S. 584, 611–12 (2002) (Scalia, J., concurring) (discussing his concerns from "observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict").

<sup>130</sup> *People v. Black*, 113 P.3d 534, 544 (Cal. 2005).

<sup>131</sup> *Id.* at 545.

<sup>132</sup> *Id.* at 544–45 & n.11.

<sup>133</sup> See *Blakely*, 542 U.S. at 308 (discussing "*Apprendi*'s bright line").

<sup>134</sup> Reitz, *supra* note 68, at 1088–1101.

<sup>135</sup> *People v. Black*, 113 P.3d at 547.

relating to offense conduct when those factual findings formally increase the upper limit of legally available sentences. The broadest reading of *Blakely* suggests that juries must make any and every finding or judgment that can affect the defendant's sentence. This broadest reading rejects the prior-conviction exception and mandatory-minimum exception set forth by the Court in *Almendarez-Torres* and *Harris*.

In the *Blakely* line of cases, one can find support for the narrowest reading, for the broadest reading, and for many readings in between. Only time, future cases, and the work of all the Justices of the Roberts Court will define the shape and brightness of *Blakely*'s line. In our concluding sections below, we highlight the challenges of, and provide some recommendations for, the line-drawing work ahead in *Cunningham* and beyond.

### C. Making Sentencing Sensible

Though the Supreme Court seems likely to find California's sentencing scheme constitutionally flawed, its opinion should accommodate the range of important policies and values discussed above. Cunningham's enhanced sentence rested on aggravating offense facts, including the victim's vulnerability.<sup>136</sup> As noted above, these historical, backward-looking offense facts are paradigmatic jury issues under *Blakely*. Another aggravating factor, that Cunningham's violent conduct indicated a serious danger to society, mixes offense and offender considerations, as well as forward- and backward-looking elements.<sup>137</sup> This hybrid evaluation draws on particular facts about this offense to make a broad judgment about how this offender may behave in the future.

However one assesses "mixed" offense/offender facts, many of California's sentencing factors are indisputably offender facts. Criminal history, employment, education, mental illness or retardation, drug use, and family circumstances are classic examples, and they all typically incorporate both forward- and backward-looking elements. Though criminal history usually requires a simple backward-looking finding as to whether a defendant committed a prior crime, one makes this finding to predict likely recidivism. Likewise, many other offender-oriented considerations, such as employment history and family circumstances, examine an offender's background and current circumstances to predict his prospects. Juries have not historically made these sorts of findings, nor are they especially well-equipped to do so. As Part II.A explained, these sorts of assessments should be the province of judges because they call for the exercise of reasoned judgment. More precisely, legislatures and sentencing commissions should be free to experiment with giving these issues to juries, while others may entrust them to judges.

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<sup>136</sup> *People v. Cunningham*, No. A103501, 2005 WL 88093, at \*8 (Cal. Ct. App. Apr. 18, 2005) (unpublished).

<sup>137</sup> *Id.* at \*8–9 (considering the violent nature of the charged offense as well as psychological evaluation of future risk and recommended psychological treatment).



Offender considerations should be treated differently from offense facts because many involve substantial predictive judgments. The evidence involved could readily prejudice how the jury, an inexperienced decision-maker, views the defendant. Amenability to rehabilitation or substance-abuse treatment and propensity to future violence are forward-looking judgments based on facts about the defendant's background and character. In other words, the diagnosis is intertwined with a prognosis and prescription. In this area, *Williams'* vision of sentencing and judges' abilities works much better than it does for offense facts. Judges need discretion to weigh and evaluate these subjective matters. Juries could be distracted or confused from their focus on assessing offense behavior.

Nevertheless, modern sentencing philosophies and sentencing structures also call upon judges to make old-fashioned criminal justice determinations: they look backward at offense behavior to assess blame and responsibility. Apart from offender characteristics, to what extent can sentencing statutes and guidelines leave judges discretion to adjust sentences based on offense facts?

Under *Blakely*, binding statutes or guidelines that conscript judges to raise sentences based on particular offense facts are unconstitutional. Juries clearly must find offense facts that trigger or raise binding statutory or guidelines maxima. The legislature or sentencing commission has codified a measure of punishment that attaches to a particular offense fact. Juries have often found these facts in distinguishing grades of crimes, and the Supreme Court, understandably worries, about letting judges usurp the jury's historic role. States that want binding guidelines must at least have juries find the offense facts that trigger particular maxima, before entrusting judges with any residual discretion within the range.

At the other end of the spectrum, purely voluntary judge-operated guidelines are constitutional. The same should be true of guidelines that are substantively non-binding but impose binding procedural requirements, such as a statement of reasons. Empirical evidence shows that voluntary guidelines are modestly effective at reducing inter-judge disparity, though not as effective as binding guidelines.<sup>138</sup> Voluntary guidelines may work for a variety of reasons. They may provide information about statistical averages. They may codify accumulated wisdom or best practices about how to implement various justifications for punishment. They may provide mental anchors or benchmarks that exert gravitational pull, leading judges to use them as starting points. Judges may, for example, use these data and benchmarks to harmonize their sentences with those of other judges, equalizing outcomes. Judges may also follow these benchmarks out of concern for their reputations and careers, lest they be viewed as deviants and not be reelected or promoted.<sup>139</sup>

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<sup>138</sup> John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines* 20–33, 85–86 tbl.7, 90 tbl.9 (Fordham Law Legal Studies, Research Paper No. 102, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=869977](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869977) (last visited Aug. 31, 2006).

<sup>139</sup> See *id.* at 48–50 (discussing some of these possible explanations without coming to any conclusions about which of them is at work).

The most interesting and least explored category is the one between these two poles. Legislatures may set default or presumptive sentences as starting points, but then give judges discretion to deviate from these starting points. These starting points may work for the same reasons that voluntary guidelines do, plus they give appellate courts benchmarks with which to review sentences. So long as the deviation does not require particular findings of offense facts, the scheme is not operating in a manner that risks invading the historic role of juries. A presumptive or default system, however, could harden into a mandatory one. For example, if the default sentence served as a safe harbor against appellate reversal, risk-averse sentencing judges would be far too tempted to abdicate their judgment. The same would be true if appellate judges almost automatically reversed deviations or did not require reasons for selecting the default sentence. Any approach that permits sentences to result from rote judicial fact-finding would be the functional equivalent of the mandatory guidelines condemned in *Blakely*.

Existing federal reasonableness review is in danger of hardening into something close to pre-*Booker* mandatory guidelines. A majority of federal circuits strongly presume that sentences within guideline ranges are reasonable but scrutinize out-of-range sentences far more closely.<sup>140</sup> Federal district courts need offer little or no justification for within-range sentences but must offer detailed justifications for departing from the range.<sup>141</sup> The farther the sentence departs from the range, the more compelling the reasoning must be to justify the departure.<sup>142</sup>

The touchstone in this area, as Part II.A suggested, should be reasoned judgment. As Judge Jeffrey Sutton put it, “[t]he end is not process in itself but the substantive goal that trial judges exercise independent and deliberative judgment about each sentence—making these sentences more than an algebraic equation and less than a Rorschach test.”<sup>143</sup> Judges merit a sentencing role distinct from juries so long as they exercise reasoned judgment. If they use a benchmark as a starting point to explain why an ordinary case deserves an ordinary sentence, their reasoned judgment is reviewable on appeal. If they give no or perfunctory reasons, their decision is not effectively reviewable on appeal. If they use a benchmark to explain why an extraordinary case deserves a higher sentence, they are again exercising reasoned, reviewable judgment. Sentencing judges would conform to the benchmark when

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<sup>140</sup> See *United States v. Buchanan*, 449 F.3d 731, 735 (6th Cir. 2006) (Sutton, J., concurring) (documenting 7–4 circuit split in favor of presumption that within-guidelines sentences are reasonable); Adam Lamparello, *The Unreasonableness of “Reasonableness” Review: Assessing Appellate Sentencing Jurisprudence After Booker*, 18 FED. SENT’G. REP. 174, 175–77 (2006) (collecting cases).

<sup>141</sup> See Lamparello, *supra* note 140, at 175–77.

<sup>142</sup> *United States v. Lazenby*, 439 F.3d 928, 932 (8th Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005).

<sup>143</sup> *Buchanan*, 449 F.3d at 741 (Sutton, J., concurring); see also Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. Pocket Part 142 (2006), <http://www.thepocketpart.org/2006/07/berman.html> (reading *Booker* as requiring “district courts to exercise independent reasoned judgment when imposing a sentence”).

there was good reason to conform, and deviate when they had particular, articulable reasons for doing so. This approach would encourage good equality (treating like cases alike) while obstructing bad equality (treating unlike cases alike).

A truly rebuttable presumption of reasonableness is a fine way to encourage equality and consideration of relevant factors, so long as it does not supplant reasoned judgment. One way to promote this reasoned judgment is to make sentencing judges walk through procedural steps. Federal sentencing judges must find guidelines facts, calculate guidelines ranges, consider departures and statutory factors, recognize that the guidelines are not mandatory, and give reasoned explanations for sentences whether they fall within or outside the presumptive range. Appellate courts reverse sentences that do not comply with these procedures and presume reasonable only those sentences that comply.<sup>144</sup> In other words, sentencing judges must consider how typical a case is along various dimensions, think about the goals of sentencing, and recognize their own discretion. A sentencing commission's collective wisdom and expertise, embodied in guidelines, deserve weight in this process. Giving guidelines this limited presumptive weight promotes equality among like cases, while leaving plenty of room to treat unlike cases differently.

Our final point draws on legal-process values. The modest vision of constitutional sentencing law set forth above would preserve the jury's core function. At the same time, it would leave healthy room for other actors and jurisdictions to experiment and find workable solutions. Reasoned sentencing opinions would over time develop into a common law of sentencing, as diverse judges articulated consensus views about which factors should matter. Reasoned opinions would be more transparent than federal mathematical mumbo-jumbo. Legislatures, commissions, and voters could thus critique, revise, and sometimes codify the resulting sentencing factors. Jurisdictions could keep learning from each other's successes and mistakes and evolve toward consensus best practices, much as state sentencing guidelines have done.<sup>145</sup>

Sentencing structures and rules in many states are still emerging and evolving. Especially in the wake of *Apprendi* and *Blakely*, state sentencing developments have become more attentive to jury trial rights. But modern reforms should balance other competing sentencing considerations, and states are finding many ways to accommodate the interests championed in *Apprendi* and *Blakely*. Local variations, and the decentralized wisdom of myriad actors, are far more likely to arrive at workable solutions than a rigid and far-reaching Court-imposed scheme.<sup>146</sup> Doctrinal straitjackets create hydraulic pressure in states to evade the new strictures by plea bargaining or raising sentences.<sup>147</sup> *Cunningham*, we hope, will show a healthy respect

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<sup>144</sup> *Buchanan*, 449 F.3d at 737 (Sutton, J., concurring).

<sup>145</sup> See *supra* text accompanying notes 47–51.

<sup>146</sup> See Bibas, *supra* note 49, at 11–13.

<sup>147</sup> See *Blakely v. Washington*, 542 U.S. 296, 337–39 (2004) (Breyer, J., dissenting) (discussing use of plea bargaining to circumvent *Apprendi* and *Blakely*); Bibas, *supra* note 24, at 1150–70 (discussing same, for *Apprendi*).

for other institutions and leave other branches plenty of room to experiment and balance competing considerations.

To respond to these concerns in *Cunningham*, the Supreme Court should render a modest decision that will probably disappoint all the litigants. The Court should reject California's efforts to evade *Blakely*'s demands completely. California judges may not unilaterally raise maximum sentences based simply on offense facts that amount to an aggravated version of the crime of conviction. The Court should also emphasize, however, that judges may still find offender characteristics and exercise forward-looking reasoned judgment. Perhaps most importantly, *Cunningham* should clearly, cogently, and cautiously articulate the core principles and perspectives that should guide the development of sentencing law.

## V. CONCLUSION

The polarized sentencing battle between the Court's two wings has produced a jumble of rigid rules without nuance or room for competing principles. The result has often been fragmented and incoherent, with no reasoning commanding a clear majority of the Court. Lawyers struggle to understand the controlling positions of Justice Thomas in *Almendarez-Torres*, Justices Scalia and Breyer in *Harris*, and Justice Ginsburg in *Booker*. Now that two new Justices have joined the Court, the Roberts Court should move past these fragmented opinions to incorporate their competing insights into sentencing law. Justices Stevens and Scalia make important points about protecting juries, regulating judicial discretion, and ensuring due process. Justices Breyer and Kennedy make equally important points about leaving room for experimentation, inter-branch dialogue, and compromise. Chief Justice Roberts, we hope, can bring these factions together and synthesize their insights.

*Cunningham* offers a tremendous opportunity to bring unity to a badly fractured and polarized area of law. The jury deserves its historic role of setting maximum punishments by finding offense facts beyond a reasonable doubt. Judges, however, also have distinctive contributions to make. At sentencing, they should be able to find offender facts and use their expertise to make fine-grained assessments and predictions. They should also exercise reasoned judgment, reviewable on appeal. Voluntary or even presumptive guidelines are desirable ways to equalize and harmonize sentences. The key is that they must serve as a starting point for reasoning and not a substitute for it. The Court should leave legislatures and other actors flexibility to experiment with these mechanisms, so states can continue to serve as laboratories of experimentation within our federal system.